BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY GRAYS HARBOR COUNTY TO DONALD W. LINDGREN	
SLADE GORTON, ATTORNEY GENERAL, Appellant, v. GRAYS HARBOR COUNTY, DONALD W. LINDGREN, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 232 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A formal hearing in this matter was held in Westport, Washington, on Thursday and Friday, April 28 and 29, 1977 before the Shorelines Hearings Board: Chris Smith, Dave J. Mooney, Robert E. Beaty, Robert F. Hintz and William A. Johnson. Ellen D. Peterson presided.

Assistant Attorney General Carol A. Smith represented appellant Slade Gorton, Attorney General; respondent Donald Lindgren was represented

by B. C. Poole; Deputy Prosecutor Dennis R. Colwell represented Grays Harbor County; Assistant Attorney General Jeffrey D. Goltz appeared for respondent Department of Ecology.

Having heard the testimony, having examined the exhibits, having read arguments of counsel, the Board comes to these

FINDINGS OF FACT

I

In March, 1976, Donald W. Lindgren applied to Grays Harbor County for a substantial development permit and variance to build a "permanent home" on his Lots 12, 13 and 14 in the SW1/4 of Sec. 25, T. 16 N., R. 12 WWM. The property, located approximately five miles south of Westport, Washington, is on a shoreline of statewide significance which has been designated "Conservancy" within the Grays Harbor Master Program. The Conservancy designation extends 200 feet east or landward of the marram grass line, the first line of vegetation on the beach.

II

Following a public hearing on the application, a variance permit was issued by Grays Harbor County to Mr. Lindgren on May 13, 1976 for construction of "single family residence within required setback from marram grass line along ocean dunes." The variance permit as conditioned was approved by the Department of Ecology on June 8, 1976; a request for review of the permit as granted and approved was filed by the Attorney General on July 8, 1976.

III

The Grays Harbor Master Program provides in relevant part:

ADMINISTRATION POLICIES:

. . .

2. Shorelines of Statewide Significance: . . . .

(a) Recognize and protect the statewide interest over local interest. . . .

(b) Preserve the natural character of the shorelines. . . .

- Minimizing man-made intrusion on the shorelines
- Where intensive development already occurs, upgrade and redevelop those areas, before extending high intensity uses to low intensity use or undeveloped areas.

. . . . Chapter 2.2, p. 25.

CHAPTER 13 Minimum Lot Sizes and Water Frontage:

(1) The minimum lot size in the Natural and Conservancy Environments shall be five (5) acres.

. . . . p. 41.

CHAPTER 16 Public Access Regulations. . . .

(1) Shorelines of Statewide Significance

(a) Residential . . . development . . . shall provide a linear public easement . . . at least 25 feet wide along the ordinary high water line . . . .

. . . . p. 42.

CHAPTER 22 Conservancy Environment Regulations.

(1) Purpose: The Conservancy Environment is inteded [sic] to protect lands, wetlands, and water of economic, recreational and natural value. Development for purposes which would be detrimental to resource capability and utilization is not permitted.

. . .

(5) Setbacks: . . . "...provided that on accreted ocean front land no structure, surface paving or earth

changing shall be permitted within 200 feet of the line of marram grass vegetation except that minor surface paving and earth changes may be permitted in said 200 feet zone provided such action is necessitated by a permitted residence lying shoreward of said zone and further provided that no modification or adverse impact is caused to the primary dune system."

. . . . pg. 49.

CHAPTER 24 Nonconformities.

. . .

Sites: Sites lawfully created as a separate parcel of land prior to the adoption of this Resolution where such site is less than the lot size specified in Chapter 13 shall be considered a legal development site subject to the maximum coverage limitation and all other requirements of the Master Program. p. 50.

IV

The Lindgren parcel does contain less than the minimum five acres cited in Chapter 13. However, though unrecorded, the property was platted prior to the adoption of the Grays Harbor Master Program.

V

It is uncontroverted that no point of the Lindgren property lies further than 169 feet behind the line of marram grass vegetation. The Lindgren lots at issue are one of ten platted property ownerships on the south shore of Grays Harbor County on which construction would require a variance from the setback requirements of the master program.

VI

Grays Harbor County contains twenty-four miles of coastline dunes, a limited and diminishing natural resource. These coastal dunes were formed and continue to develop primarily as a result of the transport

and deposition of sediment along the shoreline.

Basically, formation and retention of the dunes depend upon the existence and interaction of wind and sand. The dune system is also influenced by the vegetation common to the region which acts to stabilize the mobile sand.

Dune areas are comprised of three basic environmental systems: elevated foredunes fronting the ocean, deflation plains forming behind or on the lee of the dune, and a more stabilized back-land system of mature deflation plains and secondary or back dunes.

The first ridge of vegetated sand paralleling the beach above the normal high tide line is known as the primary or fore une. The fore dune is stabilized by its vegetative cover of American Dunegrass and the European or Marram Beachgrass which thrive under sand burial conditions

The foredune acts as a natural buffer for winds and coastal flooding. The elevated dune both decreases the energy of the wave action and performs as a dike in holding back the waters. While structures can also represent a wall against the elements, they are less reliable as flood deterrents than the natural dune because of potential erosion and undercutting.

VII

Mr. Lindgren purchased his dune property for $11,000.00 in July, 1972, at which time a septic tank was installed. Presently existing on the site behind the foredune is a trailer home used by the permittee and his family; four or five feet were excavated in the back side of the dune for this purpose. A walking easement with wooden steps is located on the south side of the property. The easement provides beach

access for the developed community of clustered single family homes sited on the deflation plain and secondary dunes to the east of the Lindgren lots. Mr. Lindgren testified that he would execute an easement on the beach to the west as required by Chapter 16 of the master program. Immediately to the north of the Lindgren parcel is a permanent home constructed on the foredune.

Visually, construction of the Lindgren permanent home would add little to the existing intrusion of residential development into the dune system.

VIII

Vegetation on the relatively flat Lindgren foredune is primarily European or marram beach grass which can be expected to recover from any disturbance caused by construction.

No further grading or fill will be required for the proposed dwelling, which is designed to set back forty-four feet from the crest of the dune. An even more easterly siting for the home is foreclosed by the community well which serves the cluster of homes in the area (development is not permitted within 200 feet of the well). No access or gap roads breach the dune adjacent to the Lindgren property.

Physically, construction of the Lindgren home, as proposed, will not further encroach upon the stability of the foredune or diminish the dune's effectiveness as a flood deterrent.

IX

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I

By Order on Motion for Summary Judgment dated March 7, 1977, the Shorelines Hearings Board ruled in this matter that:

> [E]ven though no substantial development permit may have been required, a variance from the master program was and is required, thus necessitating the issuance of a [variance] permit.

II

Pursuant to RCW 90.58.140(12) ". . . Any permit for a variance . . . by local government under approved master programs must be submitted to the [Department of Ecology] for its approval or disapproval." The Department of Ecology regulation, WAC 173-14-150, promulgated to implement its approval authority provides:

> . . .
> VARIANCES. A variance deals with specific requirements of the master program and its objective is to grant relief when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the master program. A variance will be granted only after the applicant can demonstrate in addition to satisfying the procedures set forth in WAC 173-14-130 the following:
> (1) That if he complies with the provisions of the master program, he cannot make any reasonable use of his property. The fact that he might make a greater profit by using his property in a manner contrary to the intent of the program is not a sufficient reason for a variance.
> (2) That the hardship results from the application of the requirements of the act and master programs, and not, for example, from deed restrictions or the applicant's own actions.
> (3) That the variance granted will be in harmony with the general purpose and intent of the master program.
> (4) That the public welfare and interest will be preserved; if more harm will be done to the area by granting the variance than would be done to the applicant by denying it, the variance will be denied.

III

In reviewing the variance permits in this matter, Grays Harbor County was required to apply the criteria for the granting of a variance found in Chapter 34 of its master program.

(1) The hardship which serves as basis for granting of variance is specifically related to the property of the applicant.

(2) The hardship results from the application of the requirements of the Act and Master Program and not from, for example, deed restrictions or the applicant's own actions.

(3) The variance granted will be in harmony with the general purpose and intent of the Master Program.

(4) Public welfare and interest will be preserved; if more harm will be done to the area by granting the variance than would be done to the applicant by denying it, the variance will be denied.

Failure to satisfy any one of the above will result in denial of the variance.

IV

At no time did the appellant specifically allege that the variance granted to Mr. Lindgren failed to meet the substantive criteria of either the Department of Ecology variance regulation, WAC 173-14-150, or Chapter 34 of the Grays Harbor Master Program. However, it is the Board's judgment that the Lindgren application meets the criteria of both the regulation and the master program provision. Specifically, the Board concludes that: (1) if Mr. Lindgren complies with the setback requirements he cannot make any reasonable use of his property; (2) the hardship results from the application of the requirements of the Act and master program and not from the applicant's own actions, and (3) construction of the Lindgren dwelling would not be incompatible with th

general purpose and intent of the master program.

V

Criterion four of both WAC 173-14-150 and Chapter 34 of the master program requires in essence a balancing of the projected detrimental effects to the subject area from approval with the projected consequences of denial to the applicant.

The concerns of appellant regarding detrimental effects to the dune area from construction of the Lindgren home include damage to the marram grass, weakening of the dune, adverse impact on quality and quantity of ground water in the deflation plain, and aesthetic degradation. As applied to the specific facts of the Lindgren proposal, these impacts were found to be minimal, speculative, or unfounded. Comparing such effects with the applicant's documented investment in funds, time, and installations at the site, the Board concludes that damages which would be suffered by appellant Lindgren from denial exceed any anticipated harm to the area from construction. The fourth variance criterion therefore has also been met in this case.

VI

Further, it was not established that the Lindgren dwelling as proposed would violate the policies of the Shoreline Management Act itself (RCW 90.58.020), specifically those policies which require the prevention of piecemeal development and protection against adverse effects to public health, land, vegetation, and wildlife.

VII

Appellant's additional contentions in this matter are without merit. The permit as granted by Grays Harbor County and approved by the

Department of Ecology did require that the dwelling be located as far easterly on the property as practical; this condition and the transcript of the public hearing reflect the expression of some concern for protection of the primary dune and natural character of the shoreline. Thus, chapter two of Administrative Policies, 2(a) and (b) was not ignored.

VIII

The Shoreline Management Act provides for a de novo hearing before the Shorelines Hearings Board. The particular procedural defects cited by appellant[1] which may have accompanied the processing of the instant application were rendered immaterial and harmless as to the appellant by the de novo hearing held in these matters.

IX

The permittee was exempt under Chapter 24 of the master program from the minimum lot size provision of Chapter 13(1).

Appellant's contention alleging violation of the master program provision regarding setback requirements is inappropriate in this case wherein the essence of the case is a request for a variance from such provision.

X

RCW 43.21C.070, enacted in 1973, authorized the Department of

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1. (1) failure to specifically identify each provision of the master program from which a variance was sought
(2) failure to provide a rationale for each such variance sought
(3) no record provided indicating basis for decision reached
(4) failure to provide linear public easement of at least twenty-five feet along ordinary high water line as required by Chapter 16 of the master program.

Ecology to promulgate regulations classifying those single family residences which would be exempt from the "detailed statement" requirement of the State Environmental Policy Act (SEPA), RCW 43.21C.030. Prior to the 1974 amendments to the Act, the Department of Ecology did adopt such regulations: WAC 173-34-030:

> All classes of acts of branches of government in Washington relating directly to construction or modification of individual single-family residences located in areas of the state, other than sensitive areas, are exempted from the "detailed statement" requirement of RCW 43.21C.030 of the State Environmental Policy Act of 1971. . . ."

"Sensitive areas" was defined as "any area which . . . is within 'shorelines of the state' as defined in the Shoreline Management Act of 1971." WAC 173-34-020.

However, in 1974, amendments to SEPA created the Council on Environmental Policy (CEP).[2] CEP's clear responsibility under the amendments was to prepare comprehensive guidelines for the interpretation and implementation of SEPA. No exclusion of single family dwellings from such a comprehensive review was made. The Department of Ecology's scope of authority under RCW 43.21C.070, which it exercised prior to the adoption of the CEP guidelines, was an interim measure whose purpose was subsumed and superseded by the CEP guidelines and the model

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2. RCW 43.21C.110.

ordinances drafted and adopted pursuant thereto.[3]

The subject proposal falls within the categorical exemptions of the SEPA guidelines, which exempt proposals identified therein from "the threshold determination and EIS requirements of SEPA and these guidelines. The specific language, WAC 197-10-170(1)(a) exempts "[T]he construction of any residential structure of four dwelling units or less."

Possible exceptions to the categorical exemptions do not apply in this case. The Lindgren application does not involve "a series of exempt actions . . . which together may have a significant environmental impact" (WAC 197-10-190(41)); nor does the request for an area variance from setback requirements constitute a "rezone" application (WAC 197-10-170(1)).

The SEPA guidelines, WAC 197-10-173, do provide for the designation of environmentally sensitive areas by respective jurisdictions within which the categorical exemptions would not apply. However, such a designation has not been made for the subject area by Grays Harbor County.

Thus, it was not error for either the Grays Harbor Commissioners or

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3. While the repeal of statutory provisions by implication is not generally favored, such an implication is warranted in this instance and meets the test of Stephens v. Stephens, 85 Wn.2d 290, 295 (1975):

> Statutes are impliedly repealed by later acts only if "(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction."

the Department of Ecology to fail to require a threshold determination or E.I.S. in this matter.

XI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Shorelines Hearings Board enter this

ORDER

The variance permit granted to Donald Lindgren by Grays Harbor County as conditioned and as approved by the Department of Ecology is affirmed: the permit is remanded to Grays Harbor County for reissuance of the permit with the following additional condition:

> Permittee shall provide a linear public easement or dedication at least 25 feet wide along the ordinary high water line.

DATED this 10th day of June, 1977.

SHORELINES HEARINGS BOARD

CHRIS SMITH, Member

DAVE J. MOONEY, Member

ROBERT E. BEATY, Member

ROBERT F. HINTZ, Member

WILLIAM A. JOHNSON, Member

Did not participate
W. A. GISSBERG, Member